United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2153

To Be Argued By:

GAGE ANDRETTA

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2153

KHALIEB McKINNON, LAURENCE MINCY, DAVID WHEELER,

Plaintiffs-Appellants,

-against-

J.W. PATTERSON, JOSEPH W. PERRIN and ROBERT E. McCLAY, individually and in their capacities as Deputy Superintendents of Eastern New York Correctional Facility and Attica Correctional Facility, respectively, BENJAMIN WARD, in his capacity as New York Commissioner of Corrections, PETER PREISER,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York (Stewart, J.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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P/S

Gage Andretta
Richard A. Fuchs
Attorneys for Plaintiffs-Appellants
Office and P.O. Address:
919 Third Avenue
New York, New York 10022
Tel. No. (212) 371-6000

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Preliminary Statement

Defendants-Appellees in their answering brief cannot dispute that no advance notice of the charges was given to the prisoners prior to the Adjustment Committee interviews, or that Lieutenant Demskie, the senior officer on the Adjustment Committee panel, was present at the laundry, viewed the disturbance and spoke with the officers who were also present, or that defendants J.W. Patterson and J.W. Perrin, as Superintendent and Deputy Superintendent in charge of the care and

custody of the inmates at Eastern, were ultimately responsible for the discipline of inmates. The defendants do not attempt to refute the underpinnings of the district court's findings concerning the inadequacy of the hearings afforded.* Instead, they urge that the hearings must be deemed sufficient because an explicit Corrections rule was not violated; state that even if the failure to grant a review violated Corrections rules, such a violation and the resulting indefinite keeplock are of no significance; assert that, in any event, none of the defendants was personally involved in or should answer for the wrongs done to the prisoners; claim that good faith is established by blind adherence to outmoded policy and buckpassing; and conclude that for the above reasons damages cannot be assessed. Finally, defendants claim that expunction is inappropriate because no matter how defective the adjudicatory process, the prisoners were proven guilty at a trial almost three years after the laundry dispute occurred. Under the facts of this case, defendants' position is untenable.

The district court concluded that the prior involvement of an officer on the hearing panel in the dispute in

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*Except for a conclusory statement that the hearings were impartial because Lt. Demskie was outside rather than inside the laundry. Answering Brief of Defendants-Appellees, footnote at 12 (hereinafter "Defendants' Answering Brief"). See pp. 4-5, infra.

issue and the failure to provide any advance notice of the charges or the hearing contravened fundamental due process rights of the prisoners and rendered the Adjustment Committee hearings constitutionally deficient. Further, the district court impliedly found that the defendants (hereinafter "the Corrections Officials") were directly responsible for the violations of the prisoners' constitutional rights, a finding which has substantial support in the record and prior case law in this Circuit.* The lower court erred, however, in concluding that the Corrections Officials had exercised good faith in spite of their wrongful acts. The facts in the case at bar demonstrate that the Corrections Officials knew or should have known of the inadequate hearings and the failure to afford the prisoners a review, as well as the transfers motivated by the deficient hearings, yet at all times disclaimed responsibility and shirked their assigned tasks of supervising the disciplinary system at Eastern. The Corrections Officials should be required to answer in damages for their failure to act fairly and reasonably.

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*See pp. 9-16, infra.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING MONETARY DAMAGES TO THE PRISONERS

A. The Procedures Accorded the Prisoners Violated Their Rights to Due Process Under the Fourteenth Amendment*

The Corrections Officials in their answering brief argue that the hearings were in fact impartial because the involvement of Lieutenant Demskie in the laundry incident "appears to be zero." Defendants' Answering Brief, footnote at 12. The Corrections Officials' argument is premised on the location of Lieutenant Demskie outside rather than inside the laundry room, concluding that he was therefore not "involved" in the incident. This distinction is too fine to have any significance, depending as it does on the difference of a few feet.

One of the officers present stated in his report to Deputy Superintendent Perrin and Superintendent Patterson that he had reported the problem to Demskie and asked him to go to the laundry (A-124; Tr. 357). When the officer arrived

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*Plaintiffs-Appellants have argued the issue of the unconstitutional hearings in their Answering Brief to defendants' cross-appeal, which was filed with this Court on February 14, 1977 (hereinafter "Plaintiffs' Answering Brief"), to which the Court is respectfully referred.

at the laundry, Demskie was "outside the laundry discussing the problem" with the civilian laundry worker and one of the officers in charge, Barthel (A-110, 124). Demskie was the senior officer in charge of the area which included the laundry. (Id.) Later, Demskie was part of a team which included Barthel, one of the charging officers, and which selected certain of the inmates keeplocked for more favorable treatment (Tr. 155-157). Accordingly, it cannot be rationally argued that Lt. Demskie was "a disinterested decision maker." Cardaropoli v. Norton, 523 F.2d 990, 996 (2d Cir. 1975). See, e.g., Powell v. Ward, 392 F. Supp. 628, 633 (S.D.N.Y. 1975), modified on other grounds, 542 F.2d 101 (2d Cir. 1976) (witness or investigative officer cannot be hearing officer); Sands v. Wainwright, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973), vacated on other grounds, 491 F.2d 417 (5th Cir. 1973), cert. denied, 416 U.S. 992 (1974) (witness to events disqualified as disciplinary committee member); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569, 575 (E.D. Pa. 1972); Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971) ("Each member of a panel must . . . be free of prior involvement with the incident under examination so that he may settle the case on the basis of the evidence at the hearing."). Demskie's position as supervisor of the charging officers as well as the area which included the laundry room, and his presence directly outside the laundry, able to see and hear the dispute, belie the Corrections Officials' argument

that a hearing panel which included an investigating officer-witness was impartial.

As to the failure to grant the prisoners the review called for by the first Adjustment Committee panel, the Corrections Officials claim that this hearing was not necessary because the Adjustment Committee could have imposed up to two weeks keeplock without a review and argue that, in any event, this violation of state rules did not impinge upon a federally protected right. Defendants' Answering Brief at 21-23.

Of course, there is a significant difference between what the Adjustment Committee panel was empowered to do and what it in fact did. Although the panel could have imposed two weeks keeplock, it did not; it imposed seven days keeplock with a review (A-29, 31; Tr. 28-29, 76, 130). If penalties up to the maximum can be imposed ex parte by the Corrections Officials after an Adjustment Committee hearing, then an inmate could arguably be keeplocked for two weeks after an Adjustment Committee had merely imposed a loss of certain privileges, since such confinement was within the permissible range of sanctions. 7 N.Y.C.R.R. § 252.5(e)(2) (1970).

The Adjustment Committee panel determined that the prisoners should be keeplocked for seven days and then given a review to determine what additional punishment, if any,

should be imposed. The review was therefore not only mandated by the Corrections rules, see 7 N.Y.C.R.R. §§ 252.3(f), 252.5(f) (1970), but was also compelled by the Constitution, since additional substantial deprivations cannot be meted out without procedural safeguards, and certainly not at the whim of the Corrections Officials. See Brief for Plaintiffs-Appellants, filed January 14, 1977, at 25-26.

Furthermore, the statutory mandate of a review after seven days keeplock, set forth in the Department of Corrections regulations, 7 N.Y.C.R.R. § 252.3(f) and § 252.5(f) (1970),* creates substantive rights which cannot be ignored. By conditioning further keeplock on the findings of another Adjustment Committee panel that such punishment is warranted, the state acknowledged the liberty interest of inmates in being allowed to live in the general population which would not be denied them unless they were given an opportunity to appear before a panel to give reasons for their release. See Brief for Plaintiffs-Appellants, filed January 14, 1977, at 25-26. See generally Wolff v. McDonnell, 418 U.S. 539 (1974).

It is true, as the Corrections Officials have stated, that "not every violation of state law is equivalent to the loss of federal rights. . . ." Defendants' Answering Brief

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*The lower court concluded that § 252.5(f) made Adjustment Committee review discretionary (A-35). The language of that regulation, however, clearly indicates that once a period of keeplock has been imposed the restrictions may not be extended without a review.

at 22. In determining whether the prisoners had a legitimate liberty interest in remaining in the general population at Eastern, however, one may look to

> . . . existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [Board of Regents v. Roth, 408 U.S. 564, 577 (1972).]

In the case at bar, existing rules for the corrections institutions in the State of New York conditioned continued keeplock on a weekly review when an initial disposition of seven days was given. 7 N.Y.C.R.R. § 252.3(f); see Brief for Plaintiffs-Appellants, filed January 14, 1977, at 23-25. This requirement constitutes a state-created substantive right to a hearing prior to such additional confinement which should receive federal protection. Cf. Montanye v. Haymes, 49 L. Ed.2d 466, 472 (1976); Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973). The Corrections Officials' denigration of this right constitutes a violation of the prisoners' due process rights in contravention of the Fourteenth Amendment. See generally Wolff v. McDonnell, 418 U.S. 539 (1974).

Moreover, continued reliance on Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y. 1972), a case where due process safeguards were not at issue, is misplaced, given the substantial case authority extant in 1973 that such special confinement is indeed "substantial." See United States ex rel. Walker

v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), aff'd, 467 F.2d 51 (2d Cir. 1972); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569, 576 (E.D. Pa. 1972); Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971). See also Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972). Cf. Goss v. Lopez, 419 U.S. 565, 575-76 (1975).

The facts in the instant case demonstrate that even under the law applicable in 1973, the prisoners were not afforded fair hearings when keeplocked and were not given any hearings when that punishment was arbitrarily extended. The facts also establish that the Corrections Officials knew or should have known of the unlawful actions committed and should be held directly responsible for these deprivations.

B. The Corrections Officials Were Directly Responsible for the Deprivations Inflicted Upon the Prisoners

In Wright v. McMann, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972), this Court reasoned that a prison official may be constructively charged with knowledge of the wrongdoing of individuals over whom he exercises control, who are acting pursuant to his orders, and who report to him. See also United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Landman v. Royster, 354 F. Supp. 1302, 1316 (E.D. Va. 1973).

The testimony of defendants at the trial below established their knowledge of, and responsibility for, the events which occurred. Defendant Perrin testified that he was the Deputy Superintendent of Security Services at Eastern on June 5, 1973 (A-65); that he was in charge of the "entire uniformed personnel" (A-66) and was responsible for ensuring that "the officers [were] performing their duties in a proper way" (A-66) and that proper procedures were followed (A-69). As Deputy Superintendent, he was directly responsible under the Superintendent for the care, custody and security of all the men (A-65, 72), and was responsible for the proper functioning of the Adjustment Committee (A-80-82; Tr. 199-201).

Perrin knew about the laundry dispute soon after it began (A-67). He personally dispatched Lieutenant Blades to the laundry to deal with the situation (A-67) and received an oral report from Blades after he returned from the laundry (A-68) as well as written reports from officers Blades, Brock, Barthel, Hazeltine and Jones as well as the civilian laundry supervisor, Hartley, after the men were keeplocked (A-68; Defs. Exhs. C, E, F). He knew that the inmates in the laundry, including plaintiffs, were to be brought before the Adjustment Committee (A-68). Although he exercised close control over security, he stated that he did not remember that some of the inmates had been "interviewed" and were released from keeplock without further sanctions (A-71-72), but admitted that he was

directly responsible for the actions of the corrections personnel who interviewed the men (A-72). He testified that as a matter of regular procedure the members of the Adjustment Committee reported to him (Tr. 199-201), and, if they recommended transfer of an inmate, would do so to him or the Superintendent (Tr. 201). Perrin also stated that although he does not receive Adjustment Committee reports as a regular procedure, he does try to review all such reports as part of his duties and he does receive a report setting forth the dispositions of the Adjustment Committee for each particular day (Tr. 207-08). Further, he is responsible for ensuring that the Adjustment Committee conducts any scheduled review (A-81-82).

Perrin was also aware of the nature of the keeplock restraints imposed and, indeed, was responsible for allowing the men to have recreation after being deprived of such activity during the first week of keeplock (A-47). Perrin also knew or should have known that Lieutenant Demskie was involved in the laundry room incident from the report that then Sergeant Brock sent him (Defs. Exh. F) and which he received (A-68); and knew or should have known that Lieutenant Demskie interviewed some of the inmates after the keeplock was imposed (A-72). Perrin was responsible for assigning Lieutenant Demskie to the Adjustment Committee (A-107) and knew that Lieutenant Demskie had recommended transfer of at least one, and possibly more, inmates (Plfs. Exh. 56). He also was apprised in the

ordinary course of business of inmates recommended for transfer (Tr. 201, 234). Indeed, Perrin testified that he ordinarily receives Program Committee reports on inmates (Tr. 245).

Thus Perrin was knowledgeable about all the events which occurred at Eastern relating to the laundry room incident, was directly responsible for the proper functioning of the corrections officers and the Adjustment Committee and was involved in or at least aware of the transfer of inmates out of Eastern. See United States ex rel. Larkins v. Oswald, supra, 510 F.2d at 589; Wright v. McMann, supra, 460 F.2d at 134-35.

Defendant Patterson was the Superintendent of Eastern on June 5, 1973 (Tr. 313). He was aware of unrest at the institution because of the delay in instituting programs (Tr. 313-14). He was informed of the laundry room incident on June 5 by a telephone call from Perrin (Tr. 315, 326) and he received certain of the reports written up on the incident (A-101). He was well aware of the incident because it was the first incident at Eastern of such magnitude (A-102). He might have instructed his subordinates to interview inmates in their cells (A-104). Deputy Superintendent Perrin claimed he exercised less than normal control over the officers under his command and the inmates because "superintendent [Patterson] involved himself into [sic] this" (A-71).

These facts make clear that defendants Perrin and Patterson had direct responsibility for the actions of their

subordinates and either knew or are charged with constructive knowledge of the deprivations inflicted upon the prisoners. See United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Wright v. McMann, supra; United States ex rel. Jones v. Rundle, 358 F. Supp. 939, 948 (E.D. Pa. 1973). See also Mukmuk v. Commissioner of Dep't of Correctional Services, 529 F.2d 272, 275-76 n. 5 (2d Cir. 1976), cert. denied, 426 U.S. 911 (1976); Jones v. Manson, 393 F. Supp. 1016, 1022 (D. Conn. 1975).

The Corrections Officials, however, assert that none of them can be deemed personally involved in the deprivations inflicted because they had "nothing to do with adjustment committee proceedings here" and the failure to afford a review either never came to their attention or was not their responsibility. Defendants' Answering Brief at 13, 23. According to the Corrections Officials, those persons directly in charge of discipline at Eastern, who were at all times aware of the unusual incident in the laundry and the punishment meted out, cannot be held liable because they chose to avoid their responsiblities. In effect, the Corrections Officials claim that no one is responsible for the inadequate Adjustment Committee hearings afforded* and that only an

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*Members of the Adjustment Committee cannot be held responsible for failing to give the prisoners advance notice of the charges, since they were subordinates simply following the policies set forth by Commissioner Preiser, Superintendent Patterson and

(footnote cont'd on next page)

unnamed officer* allegedly in charge of the Adjustment Committee can be held accountable for the failure to hold scheduled reviews when the Corrections Officials set discipline policy (e.g., 7 N.Y.C.R.R. § 250.4(a), § 251.4(a), § 251.6(e)(1); A-80-82; Tr. 200-01), assigned men to the Adjustment Committee (7 N.Y.C.R.R. § 252.1(b) & (c); A-107), received reports of the Adjustment Committee dispositions (A-107-08), were responsible for supervising the men in keeplock (N.Y. Corrections Law § 137(6)(d); A-65, 72), and

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(footnote cont'd from preceding page)

Deputy Superintendent Perrin, those persons responsible for formulating and supervising procedures concerning discipline. Cf. United States ex rel. Jones v. Rundle, 358 F. Supp. 939, 948 (E.D. Pa. 1973).

Nor can Lieutenant Demskie be held responsible for failing to recuse himself from sitting on the Adjustment Committee panel after being assigned to that position by his supervisor, Deputy Superintendent Perrin, acting in the stead of Superintendent Patterson (see A-107; 7 N.Y.C.R.R. §252.1(b) and (c), §250.4(a)), both of whom were at least constructively aware of Demskie's involvement as a witness to the laundry incident (A-124).

*Since the composition of the Adjustment Committee panels changed periodically (A-106), it was never established just who was in charge of the Adjustment Committee when the reviews were scheduled to take place (A-106).

effectuated their transfers to maximum security institutions.*

As in Wright v. McMann, supra, 460 F.2d at 134-35, and United States ex rel. Larkins v. Oswald, supra, 510 F.2d at 589, the Corrections Officials cannot plead ignorance of the facts when they are charged under state law with direct responsibility for the actions taken. N.Y. Corrections Law § 137(b)(d) (1970); 7 N.Y.C.R.R. §§ 251.4(a), 251.6(e)(1), 252.1(b) & (c) (1970); A-65, 69, 72, 80-82, 107; Tr. 200-01.

The Corrections Officials were at all times kept apprised of the status of the prisoners (e.g., A-47, 101). They were aware of when they were keeplocked and when they were brought before the Adjustment Committee. They are charged with constructive knowledge of the Committee's proceedings, since they at least received summaries of the actions taken.

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*All of the Corrections Officials were personally responsible for the transfers which directly resulted from the Adjustment Committee proceedings. Deputy Superintendent Perrin knew that Lieutenant Demskie had recommended transfer of at least one inmate. (Plfs. Exh. 56). Deputy Superintendent McClay was in charge of Program Services at Eastern in June of 1973 (Tr. 336). McClay was the chairman of the Program Committee and was responsible for recommending to the Superintendent the transfer of inmates and preparing the transfer papers (Tr. 336-37). The Program Committee had access to and read Adjustment Committee Reports on inmates they were considering for transfer (Tr. 338, 346). McClay prepared the Classification Committee Reports recommending the transfer of plaintiffs and other inmates involved in the laundry to maximum security institutions (Tr. 340). Superintendent Patterson signed the Classification Committee recommendations for transfer (A-111-113). Former Commissioner Preiser was told that inmates were being recommended for transfer out of Eastern and he approved those transfers pursuant to his authority under New York Corrections Law § 23 (A-94).

They prepared, signed, approved, or were aware of the recommendations to transfer the prisoners. They directly supervised the work force and are charged with responsibility for closely monitoring inmates who are specially confined (N.Y. Corrections Law § 137(6)(d)). To hold the Corrections Officials legally responsible is not, as they suggest, to impose vicarious liability: the reasoning of this Court in Wright and Larkins refutes this contention and is controlling as to the issue of personal responsibility.

B. The Corrections Officials Failed to Establish that They Acted in Good Faith

The elements of a prima facie case were established in this action. The Corrections Officials have the burden of establishing a good faith affirmative defense in order to avoid liability. See, e.g., Pierson v. Ray, 386 U.S. 547, 556-57 (1966); Mukmuk v. Commissioner of Department of Correctional Services, 529 F.2d 272, 275 (2d Cir. 1976); Glasson v. City of Louisville, 518 F.2d 899, 907 (6th Cir. 1975); F.R. Civ. P. 8(c).

The Corrections Officials argue that the Adjustment Committee procedures were conducted in good faith because inmates in June 1973 had no clearly established right to advance notice and an impartial decision maker and because the Department of Corrections rules with respect to the

Adjustment Committeewere silent as to these requirements. This argument is without merit because under the law in existence in 1973 and the circumstances established in this case, the Corrections Officials acted unreasonably.

This Court in Sostre v. McGinnis, supra, 442 F.2d at 203, clearly implied that the nature of the process due an inmate before discipline is meted out depends upon the particular circumstances of each case, and reserved deciding what procedures must be accorded under the Constitution. Id. at 206 n.2 (Waterman, J., concurring). Several other well-reasoned decisions both in this and other circuits established that special confinement, whether designated disciplinary or administrative, solitary or segregation or padlocking, is a significant deprivation of an inmate's already limited freedom which should not be imposed without procedural safeguards. See United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.W.7, 1971), aff'd, 467 F.2d 51 (2d Cir. 1972); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), aff'd, 481 F.2d 1400 (3d Cir. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). And these and other decisions, as well as analogous case law, established that the minimum procedural safeguards necessary to ensure fundamental fairness include adequate notice and a disinterested decision-maker. See id; cf. Escalera v. New York

City Housing Authority, 425 F.2d 853 (2d Cir. 1970). Moreover, the need for such rudimentary protections in the prison setting, established by Wolff v. McDonnell, supra, were clearly foreshadowed in Morrissey v. Brewer, 408 U.S. 471 (1972).

The Corrections Officials were well aware that the distinction between disciplinary or administrative segregation and keeplock was insignificant by 1973.* And they knew or should have known that Sostre left open the question of the minimum procedures due for different types of discipline, foreseeing an emerging standard based on case-by-case analysis and the good faith of prison administrators. See 442 F.2d at 203-04; Nieves v. Oswald, 477 F.2d 1109, 1113 (2d Cir. 1973). Yet the Corrections Officials chose to adhere blindly to outmoded rules promulgated in 1970, which in any event did not speak to the issues of notice and impartiablity,** and to maintain a narrow reading of this Court's decision in Sostre, a reading which was unwarranted by the language and spirit of

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*This Court in Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), determined that many of the aspects of solitary confinement which served to make that punishment significantly more harsh than administrative segregation or keeplock constituted cruel and unusual punishment. Id. at 525. See Wright v. McMann, supra, 460 F.2d at 129.

**The absence of explicit rules concerning the procedures to be accorded students threatened with suspension was not dispositive in Wood v. Strickland, 420 U.S. 308 (1975). See Strickland v. Inlow, 485 F.2d 186, 189-90 n. 9 (8th Cir. 1973), vacated and remanded on other grounds, 420 U.S. 308 (1975).

that opinion and in disregard of later case law. Under the circumstances, the Corrections Officials' alleged reliance on existing procedures was unreasonable.

Furthermore, the failure to accord the prisoners their scheduled review, and the decision instead to tack-on an additional week of keeplock punishment, was in blatant disregard of existing state law and the prisoners' constitutional rights. Cf. Landman v. Royster, 354 F. Supp. 1292, 1297 (E.D. Va. 1973). The Corrections Officials' attempt to plead ignorance of this action as well as of almost everything else that went on at Eastern is disingenuous.

The record in the case at bar demonstrates an interesting dichotomy in the testimony of the Corrections Officials. On the one hand, they each deny responsibility for the procedures to which the prisoners were subjected, as well as involvement in the events which took place; and on the other, they assert that they acted responsibly and in good faith. Given the facts of this case, however, good faith would have necessitated that those officials responsible for disciplining the prisoners assure that proper safeguards were afforded these men. This clearly was not done.

Deputy Superintendent Perrin was in charge of the general well-being of the inmates in the institution and supervised the uniformed correctional force (A-65-66). Yet although he was aware of the incident (Tr. 187), was aware

of the Adjustment Committee "hearings" (A-73), and exercised close control over the incident (A-71), he claimed he was unaware of the "interviews" conducted by corrections officers, where some men were allowed to escape sanctions (A-71). He further stated that his close control was somewhat less than normal because "the superintendent involved himself into [sic] this" (A-71). According to Deputy Superintendent Perrin, at no time did he deem it necessary to ascertain whether the men had received the review to which they were entitled, presumably because it was not his responsibility (A-90). Mr. Perrin, evidently, deferred to the actions of Superintendent Patterson (A-71, 91, 93), Deputy Superintendent McClay (Tr. 227) and Lieutenant Demskie (Tr. 233; Plfs. Exh. 56).

According to Superintendent Patterson, however, he was busily relying on his subordinates (A-105,107). In fact, although this was the first incident of its kind at Eastern (A-102), no follow-up was done regarding the Adjustment Committee hearings by the Superintendent (A-105). And he signed the transfer requests as a matter of course (Tr. 334).

The Corrections Officials have the burden of showing that they acted in good faith. All that has been demonstrated is a lack of concern for the actions of the subordinates under their direct supervision and for the inmates under their control. To equate disregard of responsibility with lack of personal involvement and the inadequate disciplinary

procedures afforded with good faith, as the Corrections Officials seek to do in this case, is to allow the concept of reasonableness to be distorted beyond recognition. The Corrections Officials have not satisfied the good faith test of Wood v. Strickland, supra.*

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*The Corrections Officials also argue unconvincingly that the Adjustment Committee was not responsible for the transfers of the prisoners, even though the prisoners testified that the panel told them a change in program would be recommended (A-29-31), the Adjustment Committee reports were sent to the Program Committee, which prepared transfer forms which were signed the next day (A-111-113) and which referred to the incident as the prime reason for the transfers (id.), and Lieutenant Demskie, the officer in charge of the Adjustment Committee panel, recommended transfer for at least one inmate (Plfs. Exh. 56) and possibly others (A-109). Further, although defendant McClay, the Deputy Superintendent in charge of Program Services, did not remember very much, he did believe that there "probably were some supervisors that spoke to me" concerning the laundry room incident (Tr. 347-48) and admitted that the Adjustment Committee Reports on the particular inmates in question might have been a factor contributing to the recommendations to transfer (A-109). And the transfer forms all alluded to the laundry incident as the prime reason for the shipments (A-111-113). When considered together, the Adjustment Committee dispositions and the short time frame between the hearings and the Classification Committee recommendations establish that the Adjustment Committee recommended and caused the prisoners' transfers as additional punishment in contravention of Department of Corrections regulations and after affording inadequate hearings to determine the extent of the prisoners' culpability. See Irving v. Preiser, 79 Misc. 2d 486, 358 N.Y.S.2d 805 (Supreme Court, Erie County, 1974) (no authorization under 7 N.Y.C.R.R. § 252 et seq. to cause the transfer of inmates).

POINT II

THE DISTRICT COURT ERRED IN NOT ORDERING THAT ALL REFERENCES TO THE ALLEGED MISCONDUCT AND SUBSEQUENT DISCIPLINARY ACTION BE EXPUNGED FROM THE PRISONERS' RECORDS

The Corrections Officials echo the lower court's conclusion that expunction is improper because, even if the Adjustment Committee hearings were inadequate, "[t]here is no credible claim that the findings of the Adjustment Committee were inaccurate. . . ." Defendants' Answering Brief at 27-28.

Given the brevity of the Adjustment Committee reports (see A-114-116), however, it is impossible to ascertain just what those "findings" were, particularly since the Adjustment Committee merely set down the comments of each prisoner to the charge and then disposed of the matter with keeplock for seven days. (Id.) Nevertheless, as is set forth more fully in the Answering Brief for Plaintiffs-Appellants, filed February 14, 1977, at 23-24, the level of involvement of the prisoners in the laundry dispute is still at issue (see, e.g., A-16, 115, 118) and the harmful effect on the adjudicatory process of failure to provide advance notice and a disinterested tribunal can be readily inferred from the circumstances. See Brief for Plaintiffs-Appellants, filed January 14, 1977, at 7-10.

Whether the prisoners were present in the laundry and did or did not work is only part of the issue; their attitudes and the attitudes of the officers in charge of the laundry, the reasons for the incident, and the various degrees of participation, if any, in the dispute, are some of the other relevant factors which might have been considered by an impartial Adjustment Committee panel with far different results. In short, the adjudicatory process was tainted and expunction of reference to the incident and the discipline imposed is necessary if the constitutional rights of the prisoners are to have any meaning. See generally Brief for Plaintiffs-Appellants, filed January 14, 1977, at 30-36.

CONCLUSION

For the above reasons, the prisoners respectfully submit that this Court should affirm the district court's Judgment insofar as it held that the Corrections Officials deprived the prisoners of their constitutional rights to advance notice and an impartial Adjustment Committee hearing, and reverse the district court insofar as it held that the failure to afford the prisoners their Adjustment Committee reviews was not a violation of their constitutional rights and insofar as it refused to award damages and expunction. The prisoners further request this Court to remand the case to the district court for computation of damages, which should compensate the prisoners for injuries proximately resulting from the constitutional deprivations, including the transfers to maximum security institutions.

Respectfully Submitted,

Gage Andretta
Richard A. Fuchs
Attorneys for Plaintiffs-
Appellants
919 Third Avenue
New York, New York 10022
Tel. No. (212) 371-6000

ADDENDUM

New York Corrections Law §137(6)(d) (1970)

§137. Program of treatment, control, discipline at correctional facilities.

* * *

6. The superintendent of a correctional facility may keep any inmate confined in a cell or room, apart from the accommodations provided for inmates who are participating in programs of the facility, for such period as may be necessary for maintenance of order or discipline, but in any such case the following conditions shall be observed:

* * *

(d) The superintendent shall make a full report to the commissioner at least once in every five day period concerning the condition of such inmate and shall forthwith report to the commissioner any recommendation made by the physician that is not carried out by the superintendent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KHALIEB McKINNON, LAURENCE MINCY, DAVID WHEELER, Plaintiffs-Appellants, -against- J.W. PATTERSON, JOSEPH W. PERRIN and ROBERT E. McCLAY, individually and in their capacities as Deputy Superintendents of Eastern New York Correctional Facility and Attica Correctional Facility, respectively, BENJAMIN WARD, in his capacity as New York Commissioner of Corrections, PETER PREISER, Defendants-Appellees.	Docket No. 76-2153 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:

Deponent is not a party to this action, is over 18 years of age and resides at 475 Ocean Avenue, Brooklyn, New York 11226.

That on the 28th day of February, 1977, deponent served the annexed copy of the Reply Brief of Plaintiffs-Appellants on Ralph Lewis McMurry, attorney for defendants in this action, at Two World Trade Center, New York, New York 10047, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Frances A. Warshaw

FRANCES A. WARSHAW

Sworn to before me this
28th day of February, 1977

Maria F. Bartolomeo

Notary Public

MARIA F. BARTOLOMEO
Notary Public, State of New York
[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1978